

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-217044

DATE: December 11, 1985

MATTER OF: Joseph B. Riego, Sr.

DIGEST:

An employee of the U.S. Navy in the Philippines who held a position available only to Philippine nationals was separated in 1974 when he acquired U.S. citizenship which was conditional on his emigration to the United States. The Merit Systems Protection Board later found that he should have been given a 60-day notice prior to separation under reduction-in-force procedures. He is not entitled to additional backpay beyond that given by the Navy for the 60-day notice period, particularly since the record shows he was unavailable for work in the Philippines upon his emigration to the United States less than 3 months after the time of his separation. Payments under the Back Pay Act are designed to compensate employees for the pay they would have received but for a wrongful separation, and the employee cannot be considered to have lost any pay in excess of the 60 days' backpay already allowed in those circumstances.

Mr. Joseph B. Riego, Sr., requests reconsideration of our Claims Group's disallowance of his claim for additional backpay believed due because of purported improprieties relating to his separation from employment with the Department of the Navy in 1974.^{1/} On the basis of the facts presented, and the applicable provisions of law, we sustain the disallowance of his claim.

Background

Mr. Riego was an employee of the U.S. Navy Base, Subic Bay, Philippines, in the Office of the Provost until 1974. He held a position reserved for Philippine nationals under a

^{1/} This decision is issued under the authority of 31 U.S.C. § 3702 and 4 C.F.R. Part 32.

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Base Labor Agreement. Upon obtaining U.S. citizenship on April 30, 1974, he was separated and paid 20 months of severance pay. Within 3 months thereafter he moved to the United States, and it appears that that is where he has resided and been employed ever since.

In January 1979 he appealed his separation to the Merit Systems Protection Board (MSPB). The MSPB's San Francisco Regional Office initially dismissed Mr. Riego's petition as untimely filed on March 9, 1979. However, on July 24, 1980, the MSPB waived the time limit and held on December 12, 1980, that the Navy had failed to follow reduction-in-force (RIF) procedures contained in 5 C.F.R. § 351.801 (1979) and directed that Mr. Riego be reinstated. The MSPB found that the requirement to use these RIF procedures in the separation of a foreign national who became a U.S. citizen was contained in Navy Civilian Manpower Management Letter No. 301-1, March 25, 1975. The MSPB further found that the Letter had been determined to be retroactively effective, and these procedures must be followed, notwithstanding the Navy's argument that there was no position available to a U.S. citizen for which Mr. Riego could have qualified.

In an attempt to comply with the MSPB decision, the Navy reinstated Mr. Riego effective April 30, 1974, converted him to a grade GS-7 General Schedule position, retroactively issued a 60-day RIF notice, and separated him effective July 1, 1974. He was paid for the 60-day notice period.

Mr. Riego appealed the Navy's action to our Office as he had received backpay for only the 60-day period of his retroactive reinstatement. He claimed that he should receive backpay for the entire period from the date of his separation in 1974 until such time as he might be "physically" restored to the rolls following the 1980 MSPB decision. By a settlement issued May 26, 1982, our Claims Group denied his claim for backpay on the basis that he had received all that he was entitled to under the MSPB decisions. He then appealed to the MSPB which held on April 15, 1983, that Mr. Riego was entitled to current reinstatement and an opportunity to make an appropriate claim for backpay. The MSPB indicated that the case should be handled in the way that another, similar case was handled where the employee was restored to the rolls and then given the 60-day notice of his RIF. In so holding the MSPB noted that the

Navy had argued that Mr. Riego would not have been entitled to backpay for an additional period since his receipt of U.S. citizenship was conditional on his promise to emigrate to the United States, making him unavailable for duty in the Philippines. While the MSPB still required that he be currently reinstated while the Navy went through the RIF procedures, it noted that the availability for duty question and entitlement to backpay were questions for the Navy and our Office to determine.

The Navy reinstated Mr. Riego at grade GS-7 effective May 10, 1983, with applicable step increases, placed him on annual leave, went through the RIF procedures, and terminated him on August 16, 1983. He was paid for this period on the basis of being on leave rather than being required to present himself for work in the Philippines since he was then living in California. The Navy forwarded his claim for additional backpay for the period between 1974 and 1983 to our Claims Group for consideration, and our Claims Group disallowed that claim. Mr. Riego now requests further review and reconsideration.

Analysis and Conclusion

Under the provisions of the Back Pay Act, 5 U.S.C. § 5596, an employee who is found by appropriate authority to have undergone an unjustified or unwarranted personnel action is entitled upon correction of the personnel action to receive, for the period the personnel action was in effect, an amount equal to all or any part of his pay that he would have earned during that period if the personnel action had not occurred.^{2/} It must be clearly established that, but for the unjustified or unwarranted personnel action, the employee would have actually been entitled to receive the pay or allowances at issue. The Back Pay Act is designed to compensate employees for the pay they would have received but for the wrongful separation. If the employee

^{2/} The MSPB is an "appropriate authority" to determine whether an employee has undergone an unjustified or unwarranted personnel action. See 5 C.F.R. § 550.803.

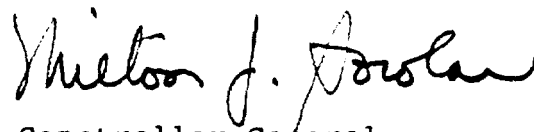
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is incapable of or unavailable for performing the work, he has lost nothing.^{3/}

It is well established that the employee bears the burden of showing that he is ready, willing, and able to perform the duties of the position from which he was wrongfully separated in order to demonstrate his entitlement to backpay.^{4/} The Navy has indicated that Mr. Riego, as a long-time employee of the Navy, was aware that his employment would be terminated upon obtaining U.S. citizenship and that Mr. Riego in applying for citizenship indicated his intention to emigrate to the United States. He did in fact emigrate shortly after his separation. After that time he was unavailable for employment in the Philippines. In addition, the Navy states that the only pay Mr. Riego would have received, but for his procedurally defective separation, was that payable during the 60-day notice period, since there was no position available for which he could have qualified as a U.S. citizen.

Based on the record we conclude that Mr. Riego has been made whole within the meaning of the Back Pay Act. He has received all of the pay and allowances which he would have received but for the unwarranted or unjustified personnel action which the MSPB found that he had undergone.

Accordingly, we conclude that Mr. Riego has received all of the backpay that could have been due him under the MSPB's decisions, and we disallow his claim for the additional amounts believed due. The prior settlements of our Claims Group in this matter are sustained.

for 
Comptroller General
of the United States

^{3/} See Kenneth L. Clark, 62 Comp. Gen. 370 (1983); and 5 C.F.R. § 550.805(b) and (c).

^{4/} See Kenneth L. Clark, supra, 62 Comp. Gen. at 373, and the Federal court decisions there cited.